IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 282

SWIFT & COMPANY, *Appellant,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

Appeal from the United States District Court for the Northern District of Illinois.

BRIEF FOR THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, INTERVENER-APPELLEE.

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MAY IT PLEASE THE COURT:

This brief is filed on behalf of The Union Stock Yard and Transit Company of Chicago, owner and operator of the Union Stock Yards in the City of Chicago, Ill. This Company, which will be referred to as "the Yard Company," was an intervener in the proceedings before the Interstate Commerce Commission, and is also an intervener in the present action. (R. 59, 124, 250.)

OPINIONS BELOW.

No opinion was written by the District Court, but its findings of fact and conclusions of law appear in the record. (R. 197-209.) The report of the Interstate Commerce Commission appears in the record (R. 57-81.), and is reported in the Commission's published reports. *Swift & Co.* v. *A. T. & S. F. Ry. Co.*, 274 I.C.C. 557.

JURISDICTION.

The jurisdiction of this Court to review the judgment of the District Court is based on 28 U.S.C.A. Secs. 1253 and 2101(b). This Court noted probable jurisdiction on October 15, 1951. (R. 228.)

STATEMENT OF THE CASE.

The proceedings before the Interstate Commerce Commission embraced two separate cases which were consolidated for hearing and covered by one report. (R. 58–9.)

One of these cases was a complaint filed by Swift & Company charging that the interstate through rates on livestock to its plant in the Stockyard District of Chicago, Ill.—each of which is a combination of the line-haul rate to Chicago and a switching charge—were unjust and unreasonable, unduly prejudicial to Swift at Chicago and preferential of competitors at other points, and unduly prejudicial to livestock as a commodity. (R. 50-5.) The prayer of the complaint, as amended, asked for the establishment of just and reasonable rates, rules and practices, including joint through rates, under which the defendant rail carriers would afford delivery of interstate shipments of livestock upon an industrial sidetrack serving Swift's plant at the flat line-haul rates to Chicago. (R. 55–6.) A reading of the complaint and the amendment thereto would indicate that the plant referred to therein was in existence; but it appeared at the hearing that the place where Swift wants delivery is a site in the vicinity of its present plant at which it proposed to construct a new plant, unloading facilities and pens.* (R. 267–9, 455–6, 931–3, 1033–4.)

The other case before the Commission was an investigation and suspension proceeding involving a tariff amendment by

* Appendix B to the Swift brief shows *proposed* buildings, switch tracks and pens indicated on Exhibit 1 before the Commission. (R. 267; Ex. 1, R. 389, 1040.)

which The Chicago River and Indiana Railroad Company, lessee and operator of the terminal switching railroad in the Stockyard District of Chicago known as the Chicago Junction Railway, proposed to cancel the application of its switching charges to shipments of livestock, except on movements to and from the Union Stock Yards in Chicago. (R. 59.) The issue presented by the proposed tariff amendment was whether, in view of the operating conditions on the Junction, a request for switching service on livestock to and from private sidetracks on its rails was a "reasonable request" within the meaning of Section 1(4) of the Interstate Commerce Act, which imposes upon common carriers by railroad the duty "to provide and furnish transportation upon reasonable request therefor." (49 U.S.C.A. Sec. 1(4).)

In its report made on July 6, 1949, the Commission concluded (1) that the combination of line-haul rates and switching charge "will not be unreasonable or otherwise unlawful" on shipments of livestock consigned to the proposed new plant, (2) that the establishment of joint through rates to Swift's sidetrack "is not necessary or desirable in the public interest," and (3) that the proposed tariff amendment "is not just and reasonable." An order was entered dismissing Swift's complaint and requiring cancellation of the suspended tariff amendment. (R. 81.)

The order entered in the complaint proceeding is attacked by the complaint filed by Swift in the District Court. (R. 1.) No challenge has been made by any party to the order entered in the investigation and suspension proceeding.

The Union Stock Yard and Transit Company of Chicago—the Yard Company—was an intervener in support of the carriers in the proceedings before the Commission, and was given leave by the District Court to intervene as a defendant in the present case. (R. 59, 124, 250.) The position of the Yard Company is that the judgment of the District Court dismissing Swift's complaint should be affirmed. (R. 210.)

Business of Yard Company.

The Yard Company owns and operates the Union Stock Yards in Chicago. At this stockyard the Yard Company furnishes various stockyard services, and also unloads inbound and loads outbound livestock by rail. (R. 423–7, 470–1, 955–6, 985–8.) In rendering stockyard services, the Yard Company is a stockyard owner subject to the Packers and Stockyards Act, 1921, and in the performance of its loading and unloading services it is a common carrier subject to the Interstate Commerce Act. (R. 926–7.) *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U.S. 193, 195; *Union Stock Yard & Transit Co.* v. *United States,* 308 U.S. 213, 217–22; *Swift & Co.* v. United *States,* 316 U.S. 216, 232.

The Union Stock Yards.

The Union Stock Yards in Chicago is the largest public market for livestock in the world, and occupies the greater part of a half section of land on the south side of the City of Chicago. (R. 719, 811, 919; Ex. 2, R. 389, 1041.) The stockyard is located on the rails of a terminal switching carrier known as the Chicago Junction Railway, and is connected, directly or indirectly, through the rails of the Junction with all of the trunk-line railroads entering Chicago. (R. 436; Ex. 9, R. 389, 1046; Ex. 13, R. 472, 1091.)

Livestock is consigned to the Union Stock Yards from nearly all sections of this country and from points in the Dominion of Canada. The major part comes from the livestock producing areas in the West and Southwest. (R. 741, 831; Ex. 43, R. 769, 1678–9.) In recent years, the total receipts of livestock of all species have ranged from more than 7 to more than 10½ million head per year. (Ex. 46, R. 845, 1848.) Approximately one-half of the receipts move into the Yards by rail and the remainder by truck. (R. 796, 997; Ex. 46, R. 845, 1843–8.) Livestock which arrives by truck comes for the most part from an area

within 175 to 200 miles from Chicago. (R. 760.) Shipments of livestock consigned to the Yards fall into two groups: (1) shipments consigned for sale on the public market at the Yards, which are commonly called "market" shipments, and (2) shipments purchased outside of Chicago by packers for slaughter in Chicago, which are known as "direct" shipments. (R. 263, 717–18.)

The Union Stock Yards is also an important shipping point for livestock. Animals are shipped from the Yards to the country for further finishing, and to packinghouses in the East and Southeast. (R. 713–4, 789–95, 818, 927–8; Ex. 43, R. 769, 1680.) The annual volume of outbound shipments in recent years has ranged from more than 1½ to more than 2 million head. The outbound movement is principally by rail. (Ex. 43, R. 769, 1680; Ex. 46, R. 845, 1849, 1853.)

In the course of a year, several hundred thousand livestock producers ship animals to the Union Stock Yards for sale. (R. 743.) Livestock is purchased at the Yards by approximately 50 packers in Chicago, by livestock feeders, by dealers, and by more than 900 packers in the East and Southeast. (R. 730–1, 789, 927, 946.) Any kind of a meat animal can be sold or purchased on the market. (R. 717, 920.)

All of the larger meat-packing plants, including the plant of Swift, and many of the smaller packing plants are located immediately west of the Union Stock Yards in a highly congested section of the Stockyard District of Chicago known as Packingtown. Other packing plants are located south, east and north of the Yards. (Ex. 2, R. 389, 1041; Ex. 21, R. 553, 1106; Ex. 34, R. 628, 1159.) There are 13 slaughterhouses on the Junction which have private sidetrack connections with its rails. (R. 444–5, 540.) Many of the smaller packers have no slaughtering facilities, but have their animals slaughtered under a custom killing basis at one of the abattoirs located near the

Yards. (R. 946.) An extensive system of alleys, overhead viaducts and tunnels owned by the Yard Company extends from the Yards to the packing plants or to public and private passageways leading thereto. These alleys, viaducts and tunnels are used in moving animals from the Yards to the packing plants. (R. 325–6, 429–33, 561, 983–4; Ex. 61, not printed.)

Throughout the years, the Union Stock Yards has been recognized by the railroads and the livestock industry as the livestock terminal of the trunk-line railroads in the Stockyard District of Chicago (R. 829, 839, 924); and it has also been so recognized by the Interstate Commerce Commission and by this Court. See, *e. g.*, *Cattle Raisers' Ass'n* v. *Ft. W. & D. C. Ry. Co.*, 7 I. C. C. 513, 523; *Live-Stock Loading and Unloading Charges*, 52 I. C. C. 209, 219–20, 224; *Hygrade Food Products Corp.* v. *A. T. & S. F. Ry. Co.*, 195 I. C. C. 553, 554; *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.*, 219 I. C. C. 531, 545; *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179, 181; *Adams* v. *Mills*, 286 U.S. 397, 409; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U.S. 193, 195; *Swift & Co.* v. *United States*, 316 U.S. 216, 225–7. Livestock is transported to and from the chutes in the Yards by the line-haul carriers, which operate with their own power and crews over the rails of the Junction directly to and from the chutes. (R. 839, 920.)

Most of the livestock consigned to Chicago by rail is delivered at the Union Stock Yards. The volume varies from year to year; but during the years 1943 through 1947, the last five-year period shown of record, it averaged about 77,000 cars per year, of which approximately 31,000 were direct shipments and 46,000 market shipments. (R. 428, 836; Ex. 28, R. 607, 1117; Ex. 43, R. 769, 1639.) Some shipments—approximately 1500 per year—are delivered on public team tracks of five of the line-haul carriers; and approximately 6500 cars per year are delivered at the facilities of the Omaha Packing Company, a wholly-owned subsidiary of Swift, located on the rails of the

Burlington several miles north of the Yards. (R. 262, 282; Ex. 9, R. 389, 1046; Ex. 17, R. 536, 1101.)

History of Union Stock Yards and Junction.

The history of the Union Stock Yards and of the Junction appears in *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.*, 219 I. C. C. 531, and in *Chicago Junction Case*, 71 I. C. C. 631, referred to at the hearing before the Commission.* (R. 388, 841, 914–27.)

The Yard Company is a corporation created by and existing under a special act passed by the General Assembly of the State of Illinois in 1865. (Ill. Laws 1865, vol. 2, p. 678.) At that time, four separate stockyards were maintained by individual railroads in the Chicago district. The maintenance of these yards was burdensome to the owning railroads, and their widely separated locations were unsatisfactory to the livestock industry and the railroads. The Yard Company was organized to replace the four separate yards with a union stockyard which would provide a livestock terminal for the railroads and a central market for livestock. The original stockholders of the Yard Company were the nine railroads then serving the Chicago district, but during the following decade they sold their holdings to other interests. (219 I. C. C. at 533; R. 769, 914–18.)

The special charter of the Yard Company authorized it (1) to construct and operate, upon land south of the southerly limits of the City of Chicago as they then existed, a general union stockyard for livestock; (2) to construct a railroad to connect the stockyard with the lines of all railroads terminating in Chicago; and (3) to operate the railroad constructed by it or

* Other cases containing a history of the Union Stock Yards and the terminal railroad known as the Junction are: *United States* v. *Union Stock Yard & Transit Co.*, 226 U.S. 286, 296–300; *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213, 215–16; *Cattle Raisers' Ass'n* v. *Ft. W. & D. C. Ry. Co.*, 7 I. C. C. 513, 521–3; *Live Stock Loading and Unloading Charges*, 52 I.C.C. 209, 210–13.

enter into operating contracts with the various connecting railroad companies. (Ill. Laws 1865, vol. 2, pp. 679–80.) The company acquired the necessary land in the open prairies south of the city, and constructed the Union Stock Yards and 30 miles of railroad connecting the Yards with the trunk-line railroads. The other four stockyards in Chicago were then abandoned. (219 I. C. C. at 533; R. 916–7, 921.)

Construction of the Union Stock Yards and of the terminal railroad was completed by December 25, 1865. During the remaining days of the year 19,810 head of livestock were received at the Yards, and more than 1½ million head were received at the Yards the following year. (R. 918; Ex. 46, R. 845, 1847.) Due to its strategic location at the junction of the termini of the western and eastern railroads, good transportation service, the rigid enforcement of honest trading practices, and high standards of service, the Union Stock Yards became, and still is, the largest and most important livestock market in the world and the price-determining market of the United States. (R. 717, 719, 722–3, 754, 770–1, 783, 806–7, 811–2, 915, 918–20.)

The 30 miles of terminal railroad constructed by the Yard Company in 1865 were the nucleus of the present Chicago Junction Railway. (71 I. C. C. at 633.) In the early days of its existence, the facilities of the terminal railroad were expanded from time to time with the growth of industries and the construction of additional railroads into Chicago. (R. 922, 925–6; Ex. 3, R. 389, 1042.) At the beginning, the road was used almost exclusively for the transportation of livestock to and from the chutes at the Union Stock Yards. (R. 921.) The trunk-line carriers were given permission by the Yard Company to operate over its tracks with their own engines and crews for that purpose, and this practice has continued throughout the years. (71 I. C. C. at 633; R. 469, 839, 920.)

Commencing about 1870, packing plants were constructed in the vicinity of the Yards, and the line-haul railroads were then

given permission by the Yard Company to carry dead freight over its terminal railroad. Lack of central control over the operations of the individual railroads on the terminal railroad resulted in unsatisfactory operation and service, and from 1887 to 1893 the road was operated first by one and later by another association controlled by the railroads. In 1893 the Yard Company acquired locomotives and commenced the handling of dead freight itself. (71 I. C. C. at 633; R. 922–3.)

In 1897 the Yard Company leased its terminal railroad to Chicago & Indiana State Line Railroad Company, and during the following year the lessee and the Chicago, Hammond & Western Railroad Company were consolidated into a corporation known as Chicago Junction Railway Company. The former Chicago, Hammond & Western properties were sold by the Junction Company in 1907 to the Indiana Harbor Belt Railroad Company. A new lease of the terminal railroad was made in 1913 by the Yard Company to the Junction Company. In 1922, pursuant to authorization given by the Interstate Commerce Commission in *Chicago Junction Case*, 71 I. C. C. 631,* the Junction Company subleased the terminal railroad to The Chicago River and Indiana Railroad Company (the River Road), a wholly-owned subsidiary of The New York Central Railroad Company,** and the Junction has since been operated by the River Road, as lessee, under the name "Chicago Junction Railway (C. R. & I. R. R. Co., Lessee)." (71 I. C. C. at 633; 219 I. C. C. at 533; R. 436, 923; Ex. 57, R. 1039, 1961.) As was pointed out in *Baltimore & Ohio R. Co.* v. *Chicago Junction Ry. Co.*, 156 F. 2d 357, 358 (C.A. 7th), since the lease of 1922, the Chicago Junction Railway Company has been

* In a supplemental report, 150 I.C.C. 32, one of the conditions prescribed in the original report, not here material, was modified.

** The order authorizing the River Road to lease the Junction properties also authorized the New York Central to acquire control of the River Road by purchase of its capital stock. *Chicago Junction Case*, 71 I.C.C. 631, 650.

"a non-operating, lessor railroad corporation," and the River Road "has been the sole operator of [the Junction railroad] under the name of Chicago Junction Railway, Chicago River and Indiana Railroad Company, Lessee."

After the construction of the first packing plants about 1870, the area in the vicinity of the Union Stock Yards began to develop industrially. By 1874 there were 15 packing plants. (R. 922.) In 1889 the Stockyard District was annexed to the City of Chicago. Annexation gave impetus to the opening up of public streets around the Stockyard District. Industrial development was rapid, and by 1907 the entire area in the vicinity of the Union Stock Yards was built up almost solid with permanent buildings owned by various industries, principally those engaged in the handling of meats, meat products, and by-products of the packing industry. In later years, many manufacturing and other industries located along the lines of the Junction. Industrial development also resulted in the construction of housing in areas in the vicinity of the Junction for the employes of the industries. (R. 501, 523–4, 924–6; Ex. 15, R. 502, 1094; Ex. 19, R. 553, 1104; Ex. 20, R. 553, 1105; Ex. 21, R. 553, 1106; Ex. 34, R. 628, 1159; Ex. 61, not printed.) There are now 499 industries with 645 private sidings served by the Junction, and the great majority of them are located in the Stockyard District or in the vicinity thereof. (R. 61, 443; Ex. 2, R. 389, 1041; Ex. 13, R. 472, 1091; Ex. 34, R. 628, 1159.)*

Deliveries of Livestock on the Junction.

The unimpeded and prompt delivery of inbound livestock is a *sine qua non* to the successful operation of a large central

* The River Road also has a number of industries with private sidetracks on its own rails to the west of the Stockyard District of Chicago. The two switching railroads (Junction and River Road proper) now operated by the River Road together have a total of 653 industries with 823 sidetracks. (R. 61, 436.)

livestock market. Ever since the original tracks of the Junction were constructed in 1865, the trunk-line railroads have been permitted to carry livestock to the Union Stock Yards over the terminal railroad with their own power and crews. Although this practice was inaugurated at a time when the Yard Company was controlled by the railroads, no change was ever made in the practice by the Yard Company after the railroads sold their holdings of its capital stock. The practice was continued by the Chicago & Indiana State Line Railroad Company and by the Chicago Junction Railway Company; and since the lease of 1922, has also been continued by the River Road, as lessee of the Chicago Junction Railway. (R. 469, 483, 493, 839, 920.)

At no time in the long history of the Union Stock Yards has livestock ever been delivered to private sidetracks of the packers. (R. 354, 471, 483, 829, 838–9, 924.) The only services which the Junction has ever rendered on inbound shipments of livestock are the switching of cars of ordinary livestock to the unloading chutes at the Yards in isolated emergency situations and the switching of cars of exhibition stock to the International Amphitheatre in the Yards. (R. 354, 429, 519–20, 530; Ex. 46, R. 845, 1846.)

Prior to the request by Swift for plant siding delivery at the flat Chicago rates,* which was made shortly before the filing of its instant complaint with the Commission, none of the large packers in Chicago had ever made any similar request. (R. 354, 838–9; Ex. 10, R. 389, 1047.) About 1890 Swift and two other packers acquired some property near the Union Stock Yards on which they constructed facilities for the receipt and holding of livestock; and in 1891 they made demands upon the Yard Com-

*This request was "that the line haul carriers accord us [Swift] direct delivery of livestock at our Chicago plant at rates no higher than those assessed by the line haul carriers for delivery at the pens of the U.S.Y. & T. Company." (Ex. 10, R. 389, 1048.) All carriers addressed denied the request. (Ex. 10, R. 389, 1049–52, 1073.)

pany that it permit the line-haul carriers to transport livestock over its terminal railroad direct to this location, which was designated as the Central Stock Yards. Upon the refusal of these demands by the Yard Company, the packers instituted suits in an Illinois state court for writs of injunction requiring the Yard Company to deliver livestock at the Central Stock Yards or to permit the line-haul carriers to make such deliveries. (R. 924; Ex. 42, R. 907, 1203–58.) On January 15, 1892, a compromise agreement was entered into, and the suits were thereafter dismissed. (R. 924; Ex. 42, R. 907, 1177–88, 1304–6.) The demands made in these suits, it should be noted, were not for plant siding delivery. The historical facts just reviewed were the subject of discussion in the opinion of this Court in *Swift & Co.* v. *United States*, 316 U.S. 216, 228–9.

In 1931 Hygrade Food Products Corporation, a small packer whose plant is located near the Union Stock Yards, filed a complaint with the Commission in which it alleged, *inter alia*, that the Junction's switching charge was inapplicable to shipments of livestock which might be placed at Hygrade's plant sidings, and, if applicable, was unreasonable, unjustly discriminatory, unduly prejudicial to Hygrade, and unduly preferential of the Omaha Packing Company, a subsidiary of Swift. The Omaha Packing Company, appearing by two of the counsel who here represent Swift, opposed parts of this claim, and the Commission found it without merit. *Hygrade Food Products Corp.* v. *A. T. & S. F. Ry. Co.*, 195 I. C. C. 553, 554, 558. In its report, at page 554, the Commission stated that no livestock had ever moved by rail to or from Hygrade's private tracks. This is the only case, prior to the present litigation, in which any packer in the vicinity of the Union Stock Yards has ever attempted to obtain private sidetrack delivery on the rails of the Junction at the line-haul rates. The Hygrade Corporation acquiesced in the decision of the Commission, and, as previously stated, the Junction has never been called upon to perform any switching serv-

ice on shipments of ordinary livestock except in emergencies, and then only to the Union Stock Yards.

A part of the Commission's order in the *Hygrade* case, not pertinent to the present discussion, was set aside at the suit of the defendant railroads in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U.S. 193. In its opinion in that case, at page 195, this Court stated:

> "*** the Hygrade Company elects, as did its predecessors, to have all livestock intended for slaughter at the plant shipped to the [Union] stockyards. These yards are livestock terminals of the carriers and are served by trains operated by them over the tracks of the Junction Railway."

This observation with respect to Hygrade applies equally to all other packers which have had livestock consigned to the Stockyard District of Chicago.

Importance of Good Railroad Service to Union Stock Yards.

The public livestock market at the Union Stock Yards is dependent upon good railroad service for the continuance of the large supply of livestock which is essential to the maintenance of a sustained buying demand. (R. 716–7, 719, 722–3, 783, 791, 808–9, 816, 928.) Delay in the transportation of livestock results in shrinkage and adversely affects its appearance. Shrinkage results in loss to the producer, and appearance has an important bearing on the price which prospective purchasers will pay. (R. 721–2, 745, 771–2, 780–2, 920–1, 943–4.) Transit time is therefore an important factor in determining the outlet to which a producer will ship. (R. 722–4, 782–3, 817, 991.) Good railroad service has been a most important factor in making the Union Stock Yards the world's largest market for livestock and the price-determining market of the United States. (R. 722–3, 791–2.)

The market at the Union Stock Yards opens about 7 A.M., and the earlier trading hours are generally the more favorable because competition during those hours is usually more intense. (R. 720, 776–7, 780, 792.) Livestock which does not arrive in time for the early morning market may have to be held over until the following day. (R. 780.) The schedules of the line-haul carriers are, for the most part, set up for arrival at the Yards between midnight and 6 A.M., so that the animals can be watered, fed, rested and classified for sale before the opening of the market. (R. 719–21, 775–6, 809.) The western railroads now have schedules under which delivery is made at the Union Stock Yards within 36 hours from points as far west as Jamestown, N. Dak., Aberdeen, S. Dak., Grand Island, Neb., Dodge City, Kans., and Oklahoma City, Okla., without a stop in transit for feed, water and rest. (R. 697, 705–6, 722, 725–6.)*

Effect of Grant of Swift Demand on Transportation of Livestock to Union Stock Yards.

The grant of the Swift demand for plant delivery of livestock at the flat Chicago rates would have a serious effect on the transportation of livestock consigned by several hundred thousand producers to the Union Stock Yards. In its report the Commission found:

> "* * * it is our best judgment, and we, therefore, so find and conclude, that, if complainant's [Swift's] demand for the [plant] delivery service at the line-haul rates were granted, there would result demands from other packers requiring defendants [railroads] to render like delivery service in an amount and volume which together with such service rendered complainant *would seriously interfere with, delay, and disrupt defendants' terminal operations*

* Under the Twenty-Eight Hour Law, the period of confinement may be extended from 28 to 36 hours upon written request of the owner or person in custody of the animals. (45 U.S.C.A. Sec. 71.)

in carrying livestock to the Union Stock Yard and in making deliveries of other freight to the industries on the Junction's lines.

"Interferences with the movement of livestock to the stockyards is a serious concern not only of defendants but also of producers and livestock marketing agencies who desire expeditious movement of livestock and *continued functioning of the public market* in a manner that is adequate for their needs." (R. 76–7; emphasis supplied.)

The congestion and consequent delays which would result from the Swift demand are so great that, even if plant delivery were otherwise practicable, the Junction would have to insist that all cars of livestock have eight hours of unexpired confinement time under the Twenty-Eight Hour Law at the time they were delivered in the Ashland Avenue South Yard. (R. 484, 522, 542–3, 561–2.) An ample margin is necessary because the operating officials of the Junction would not be able to advise the line-haul carriers, prior to the departure of a train of livestock from their outer yards, what amount of time the Junction would require to move any particular car from the receiving tracks in the Ashland Avenue South Yard to the consignee's siding. (R. 522, 562, 642, 678.)

The demand of the Junction for a safe margin of unexpired confinement time on cars of livestock consigned direct to packing plants and the congestion on its rails from the handling of such livestock would adversely affect the handling of shipments of livestock—market as well as direct—by the line-haul carriers, and the inevitable result would be a substantial increase in the overall time in transit. Additional stops for feed, water and rest would be required on shipments from more distant areas. (R. 642–3, 680–1, 702–3.) A stop for feed, water and rest always adds five hours to the running time because of the requirement of the Twenty-Eight Hour Law that the animals be given at least five consecutive hours of rest. (R. 656–7.) The actual delay may be longer because the next

train which could pick up the animals may not arrive at the stopping point until more than five hours after the animals were unloaded. (R. 785.) The making of a stop for setting out of cars of livestock also results in delay to other cars of livestock in the same train which do not have to be set out. (R. 644, 656–7.) The congestion on the rails of the Junction which would result from the handling of livestock direct to packing plants would increase the running time of the line-haul carriers from their outer yards to the Union Stock Yards by at least an hour. (R. 624, 642, 678–9, 682, 702–3.) The necessity of segregating livestock consigned direct to packing plants from other livestock in the same train would result in additional delays in the outer yards of the line-haul carriers estimated at about one hour per train. (R. 620, 623, 640–1, 657, 699–700.)

Rate Bases on Livestock to Chicago.

There are two bases of rates on livestock consigned to points in the City of Chicago. One basis, the flat line-haul rate, applies to public team tracks and industrial sidings on the rails of the line-haul carriers, and also to the Union Stock Yards, which, in legal effect, is on the rails of the line-haul carriers because they have running rights for the carriage of livestock over the rails of the Junction to the unloading chutes at the Yards. (R. 286, 375–6, 834–5, 839–40.) The other rate basis is the line-haul rate plus a switching charge, which at the time of hearing before the Commission was $28.80 per car. This rate basis applies to private sidetracks of all packers on the rails of the Junction; but it is a basis which has never been used. (R. 288–9, 354, 483, 838–9.)

Both rate bases, it will be noted, apply to deliveries on the Junction in the Stockyard District of Chicago. The line-haul rates apply where delivery is made at the Union Stock Yards by the line-haul carriers operating over Junction tracks with

their own power and crews. The line-haul carriers have no running rights to transport freight of any kind over the Junction direct to the private sidetrack of an industry. For this reason, any livestock consigned to the private sidetrack of a packer must be interchanged by the line-haul carriers to the Junction on the receiving tracks in the Ashland Avenue South Yard. (R. 497, 527, 539–40, 543, 840.) The switching charge would be assessed for the service of the Junction in handling the loaded car from the Ashland Avenue South Yard to the plant of the consignee, and thereafter returning the empty car to the line-haul carrier.

Terminal Services on Shipments to Union Stock Yards and Packing Plants on the Junction.

The terminal service required for deliveries of livestock under the rate basis applicable to private sidetracks at the packing plants on the Junction would be materially greater than the terminal service performed under the rate basis applicable on shipments delivered at the Union Stock Yards. The differences in terminal service explain the difference in the two rate bases.

Deliveries at Union Stock Yards

Livestock consigned to the Union Stock Yards is transported direct to the unloading chutes in the northern section of the Yards over the rails of the Junction by the 22 line-haul carriers with their own power and crews. (R. 439, 452–3, 469, 543; Ex. 46, R. 845, 1846.) There are 10 of these chutes with a total capacity of 350 cars. (R. 439, 475.) The train is moved onto a chute track adjacent to an unloading platform of the Yard Company. While the cars are being unloaded by the Yard Company, the engine runs around the train, and when the unloading is completed the engine takes the empty livestock cars back to the outer yards of the railroad from which they came. (R. 470–1, 474–6, 479–80, 539, 632, 660, 950.) The receiving

and delivering yards of the Junction are thus not burdened with livestock cars, either loaded or empty. (R. 469.)

Witness C. B. Heinemann, who had had many years of experience in the livestock industry and had studied the operations at terminal markets throughout the United States (R. 908–14, 945.), described the operations at the Union Stock Yards in Chicago as follows:

> "* * * you have a situation at Chicago that is unparalleled in any terminal of the world, and I think I have studied a lot of them. In this livestock traffic, as it comes to the chutes of the Union Stock Yards, you have solid trains, whether they consist of one car or 60 cars. The trains move directly to the chutes, and while the engine is cutting off and running around the train, the cars are being unloaded; and in tests that we made out there on solid trains, we found cases where they averaged 55 seconds per car in unloading this livestock." (R. 945.)

Deliveries at Packing Plants

Shipments of livestock consigned direct to packing plants, as previously stated, would have to be interchanged to the Junction in the Ashland Avenue South Yard. Because of the Twenty-Eight Hour Law and the nature of the commodity, shipments of livestock would have to be given priority in handling over other freight. *Swift & Co.* v. *United States*, 316 U.S. 216, 227.

Shipments of dead freight are classified in the Ashland Avenue South Yard for further movement to base yards serving the various operating districts. After arrival at the base yards, the cars are again classified for movement to the industries to which they are destined, and are thereafter switched to those industries. (R. 466, 476–7, 480, 557–8, 559–60.) The average time required to handle a shipment of dead freight from the time it is received at the Ashland Avenue South Yard until it is placed for delivery at an industry is 23½ hours in the case of

perishable freight and nearly 32 hours in the case of non-perishable freight. (R. 471, 511, 559–60.) It is thus obvious that shipments of livestock consigned direct to packing plants would have to be specially handled by the Junction.

Cars of livestock delivered to the Junction in the Ashland Avenue South Yard would inevitably be mixed with cars of dead freight on the receiving tracks in the yard. (R. 495–6, 528–30, 545–7, 659, 700.) Junction employes would have to segregate the livestock cars from the dead freight. This would require that inspection and other work incident to interchange be promptly performed. Engines would have to be made available to segregate the cars of livestock and return the cars of dead freight to the receiving tracks for subsequent handling by breakup crews. (R. 469–70, 496–7, 500–1, 539–40, 544–6, 639, 659.)

There are no separate tracks available for the classification of livestock, and the work of classifying the cars for delivery to the various packing plants would have to be performed by the Junction on its present classification tracks in the Ashland Avenue South Yard. It is quite possible that some of the packing companies would demand delivery of the several species of animals at different locations; and if such demands were made, there would be additional classification work in the Ashland Avenue South Yard. (R. 470, 482–3, 544, 563, 699–700.) Since cars loaded with livestock cannot be kicked, all switching operations would have to be performed with the cars coupled to the engine, and this would greatly slow up the operations on the receiving and classification tracks. (R. 469, 482, 543–4, 728–9.)

Special engine assignments would have to be made by the Junction to handle the cars of livestock from the classification tracks in the Ashland Avenue South Yard to the various packing plants, which are located in seven operating districts. If

upon arrival at the consignee's siding it appeared that the engine had more cars of livestock than could be accommodated on the siding, the engine and crew would have to remain and perform whatever switching services were required to meet the situation presented. (R. 470, 483–4, 452–3.)

Plant siding delivery of livestock by the Junction would also necessitate the removal of the empty cars by it. These cars would have to be handled through the base yards to the outbound delivering yards, which are now badly congested—to the Ashland Avenue North Yard in the case of cars for most of the western lines, and to the Loomis Street Yard in the case of cars destined to other lines. After the cars had arrived in the outbound yards of the Junction, they would have to be classified for return to the various line-haul railroads, and would subsequently have to be picked up by transfer crews of those railroads. (R. 466, 470, 477–8, 498–9, 505–6, 542, 547–8, 558, 563, 660, 700–1.)

Scope of this Brief.

Since the findings of the Commission and the evidence relating to the lawfulness of the present combination through rates on livestock to Swift's private sidetrack will undoubtedly be discussed in the briefs filed by the Government, Commission and railroads, we shall not attempt to duplicate the work of the able counsel who represent those parties. It is the position of the Yard Company that the long-established practices and rate bases affecting the transportation of livestock to points of delivery on the Junction in the Stockyard District of Chicago are not unreasonable or otherwise unlawful; that the findings and conclusions of the Commission are fully supported by the evidence; that the Commission did not commit any error affecting Swift; and that the judgment of the District Court should be affirmed.

ARGUMENT.

I.

Immediate and Ultimate Purposes of Swift's Demand for Private Sidetrack Delivery at Line-Haul Rates.

Swift's complaint and the argument advanced in its brief are directed to securing plant delivery of direct shipments at the flat Chicago rates applicable to the public livestock terminal of the railroads. Since it is obvious that, if Swift should prevail in this effort, other packers in the Stockyard District of Chicago would demand and be entitled to like treatment on their direct shipments,* and since Swift's competitive position would not be improved if Armour, Wilson and other packers could obtain plant delivery at the same rates as Swift, the immediate purpose of Swift's complaint must necessarily be to obtain an advantage over market stock purchased by its competitors at the Union Stock Yards. The ultimate purpose of Swift's effort to obtain an advantage over market stock is the destruction of the public market at Chicago as the price-determining market of this country. This conclusion is fully warranted by the record.

Since Swift was forced by a decree of the Supreme Court of the District of Columbia to divest itself of the extensive and substantial interests which it formerly had in various public stockyards, and was perpetually enjoined from owning, directly or indirectly, any interest in any public stockyard company in the United States, it has established a number of buying stations in the country to purchase livestock directly from the producer, and has consigned substantially all of the animals so purchased for its Chicago slaughterhouse to the facilities of its wholly-owned subsidiary, the Omaha Packing Company. (R. 391; Ex. 29, R. 707, 1118–21; Ex. 42, R. 907, 1458–76, 1610A–36.) Only a small part of Swift's requirements at Chi-

* This was the judgment of the Commission, and it is supported by the opinions of well qualified witnesses. (R. 76, 928, 988–9.)

cago are purchased on the public market. (R. 410–11, 1012–13, 1019.) At the hearing before the Commission Swift's counsel referred to public stockyards as "a sort of a fungus growth" and "parasitic." (R. 587, 593.) The handling of livestock by the Junction to packing plants on its line, as Swift well knows, would seriously disrupt and delay the handling of market stock to the Union Stock Yards; and the deterioration in transportation service to the Yards, as Swift also well knows, would inevitably result in the destruction of the market.

The effect of the granting of the Swift demand upon the public market at the Union Stock Yards was described by well qualified witnesses.

The Traffic Manager of the Chicago Live Stock Exchange testified as follows:

> "Q. If the Swift demand were granted and there was this interference with railroad operation resulting therefrom to which the railroad witnesses have testified, would that adversely affect the market?
>
> A. I would say * * * it would crucify the Chicago market if things came to pass as has been depicted here by these railroad witnesses, It would crucify the Chicago market." (R. 722.)

A witness who was Executive Vice President of the National Independent Meat Packers Association and Secretary of the Eastern Meat Packers Association expressed the following opinion:

> "Q. What, in your opinion, would be the effect of granting the relief that is prayed for by Swift in this case?
>
> A. Based on my experience and observation out in that [stockyard] area, I am convinced that if even a measure of the delay is encountered as has been testified to [by] previous witnesses, it would effect the serious impairment of the Chicago market and its eventual destruction." (R. 928.)

The General Manager of the Yard Company concluded his testimony with respect to the effect of the granting of the Swift demand by saying:

> "Carried through to its logical conclusion, the loss of its packer directs and a resulting reduction in open market receipts, will bring about a vicious cycle of higher and higher marketing costs per animal and lighter and lighter receipts. The result can be only one thing. As the net earnings of the Stock Yard Company become smaller and smaller, so as to yield little or no profit, the owners of the property will probably have to find some other use for it than as a livestock market, and the great Chicago livestock market would then become a thing of the past." (R. 992.)

The destruction of the Chicago market as the price-determining market of the country would put Swift in a more advantageous position in dealing directly with the livestock producers, who in general, as one of the foremost authorities* in the field of livestock marketing testified, do not have the training and experience to sell their livestock to the best advantage, and who must deal with carefully selected and thoroughly trained buyers employed by the packers.** (R. 814–15.) The

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* Dr. A. C. Ashby, Professor of Livestock Marketing, University of Illinois College of Agriculture, and at one time District Livestock Market Supervisor for the Packers and Stockyards Administration of the Department of Agriculture in Chicago, Cincinnati and Indianapolis. (R. 810.)

** Compare the following excerpt from Swift's Year Book for the year 1947:

> "The steaks that sold for $1 a pound in New York City on September 10 came from cattle dressed ten days to two weeks earlier. Although this meat could have come from many markets, let's assume that it came from Chicago.***
>
> "The farmer who produced the choice steer sent it to the Chicago market consigned to *an experienced commission agent.* The steer was displayed in a pen and *the commission man sold it for the highest price he could get from any of a large number of buyers* representing meat packing companies in Chicago and elsewhere." (Ex. 11, R. 397, 1078; emphasis supplied.)

prices at the Chicago market are now the principal guide of the producers as to the value of their livestock. (R. 717, 770–1, 818.) If Swift can destroy the Chicago market as the price-determining market, it will also be able to improve its competitive position over many of the smaller packers in Chicago, which do not have, and probably could not afford to establish, buying stations and organizations in the country.

The importance of the public market to the producer of livestock was recognized by Swift in its Year Book for 1947, from which the following is taken:

> "The meat packer who did not bid the market price for livestock would find that his competitors were getting increased volume while he would be unable to keep his plants operating and his customers supplied.
>
> "Anybody in the meat business who stays below the market quickly finds himself out of business. * * *
>
> "Meat and livestock, therefore, are just naturally going to be sold to those who bid market prices.
>
> "Competitive market prices of livestock and meat are among the most flexible in our entire economy. They must change quickly and with delicate precision to make possible the fair and efficient marketing of a perishable product whose supply varies weekly and daily." (Ex. 11, R. 397, 1076–7.)

The importance of the part played by the Chicago Union Stock Yards in the livestock industry was recognized by this Court in *Swift & Co.* v. *United States*, 316 U.S. 216, where, at page 226, the Court declared:

> "Neither the railroads nor the Stock Yards exist for the benefit of the packers alone. *** The Stock Yards are not only a facility for the transportation of direct shipments from points of country origin to the packers; they also are an important factor in the entire animal industry of the United States."

In pointing out the immediate and ultimate purposes of the Swift complaint, we have not overlooked the fact that it is not the function of the Commission to pass upon the relative merits of the two different methods of buying livestock, or to the fact that Swift has the legal right—provided it keeps its buying practices within the limitations of the Anti-Trust Laws—to employ either method in purchasing its requirements of livestock. The Commission, however, is concerned with the transportation rights of producers who ship their livestock to the Chicago market, as well as with the transportation rights of Swift. The decision of the Commission is based upon the rate standards of the Interstate Commerce Act, and those standards require a higher rate basis for private sidetrack delivery by the Junction at the various packing plants on its tracks than for centralized delivery by the line-haul carriers at the Union Stock Yards.

II.

The Long Established Practice of the Line-Haul Railroads in Making Centralized Delivery at the Union Stock Yards Is a Reasonable Practice.

Swift's complaint before the Commission was, in essence, an attack against the long established practice of the railroads—concurred in by Swift and other packers—of making centralized delivery of livestock at the Union Stock Yards. Since 1865, the Union Stock Yards has been the livestock terminal of the line-haul carriers in what is now the Stockyard District of Chicago, and Swift and other packers have concurred in the practice of the railroads since 1892. (See Statement, *supra*, pp. 6, 11–12.)

The yards and tracks of the Junction were not laid out for the handling of livestock to packing plants. The original plan of the railroads which were instrumental in bringing about the organization of the Yard Company was to make the Union Stock Yards their livestock terminal. There has never been any

departure from the original plan, and for 86 years the Union Stock Yards has been the only livestock terminal for the delivery of livestock on the rails of the Junction. It may safely be assumed that Swift and other packers have long had knowledge of this practice. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, 199. At no time prior to the demands made by Swift which preceded its present complaint to the Commission had any large packer ever made a request for private sidetrack delivery at the line-haul rates. (See Statement, *supra*, pp. 11–13.)

The demands made in 1891 were for delivery at a private stockyard established by Swift and two other packers; and the suits which were filed to enforce those demands resulted in the compromise agreement of 1892, pursuant to which the suits were dismissed. During the period following the dismissal of these suits the area in the vicinity of the Union Stock Yards became so closely built up as to preclude expansion of the yards and other facilities of the Junction. (See Statement, *supra*, pp. 10–12.)

Speaking in 1940, the Commission said in *Swift & Co.* v. *Alton R. Co.*, 238 I. C. C. 179:

> "For many years the packers, including complainant [Swift], *made the practice of which they now complain their own practice*. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, *made the Union Stock Yards their own terminal facilities in Chicago*." (238 I. C. C. at 188; emphasis supplied.)
>
> * * * * *
>
> "The packers, including complainant [Swift] and intervener [Armour], not only acquiesced in the usage and practice but, in addition * * * *have concurred in the practice and have made it their own*." (238 I. C. C. at 196; emphasis supplied.)

The evidence on which these findings were based was introduced in the present proceeding before the Commission as Ex-

hibit 42 (R. 907, 1174-1638), and there is no countervailing evidence.

Throughout the years, the Junction had no reason to anticipate that it would ever be called upon to handle livestock to packing plants, and no provision for the necessary facilities was made while it was still possible to do so. Except for the elevation of the tracks, the Ashland Avenue Yards are substantially the same today as they were in 1907, and there is now no room for expansion. (R. 461, 544, 563, 925-6.) As the Commission found in the present case:

> "There is no land available for the expansion of those [Ashland Avenue] yards or the building of additional facilities nearby for interchange and classification of traffic." (R. 60.)*

The present case is the third effort made by packing interests to destroy the Union Stock Yards by an attack upon the practice of making centralized delivery of livestock, which, under the circumstances obtaining, is an essential element of its continued operation. In the two earlier cases the practice was upheld by this Court.

In *Atchison, T. & S. F. Ry Co.* v. *United States*, 295 U.S. 193, it was held that the transportation of livestock consigned direct to the Hygrade Food Products Corporation, a packer whose plant was near the Union Stock Yards, did not include delivery within the packing plant by means of facilities of the Yard Company. The order under review had been entered by the Commission in *Hygrade Food Products Corp.* v. *A. T. & S. F. Ry. Co.*, 195 I. C. C. 553. The Commission had held that the packing company was entitled, as a part of the service

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* In *Chicago Junction Case*, 71 I.C.C. 631, 634, the Commission had previously (1922) found: "The Junction properties are incapable of expansion so as to afford adequate facilities for interchange and classification, since the district in which they lie is highly developed and intensively used,***."

covered by the line-haul rates, to use the properties of the Yard Company, including an overhead runway, to remove its animals from the unloading pens in the Yards to its plant. In holding that transportation did not include the use of the properties of the Yard Company for egress, or delivery within the consignee's plant, this Court, at pages 200-1, said:

> "Long continued practice and special conditions made unloading at these [Union Stock] yards a transportation service to be performed by the carrier. *Adams* v. *Mills, supra*, 410. So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties for this service from mere egress such as is included in transportation of livestock to destinations other than public yards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways. Transportation does not include delivery within the Hygrade plant or the furnishing of the properties, overhead runway and all, that are used for that purpose. Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by § 15(5)."

More recently, in *Swift & Co.* v. *United States*, 316 U.S. 216, this Court upheld the order entered by the Commission in *Swift & Co.* v. *Alton R. Co.*, 238 I.C.C. 179. In that case Swift, supported by Armour, asked for an order requiring the railroads serving the Union Stock Yards to afford egress for direct shipments of livestock from the unloading pens at the Yards to a public street without charge in addition to the line-haul rates. The final conclusion of the Commission was that the transportation of direct shipments ended when they were unloaded into the unloading pens at the Yards; and in reaching this conclusion the Commission relied heavily upon the practice which had obtained and the acquiescence of the packers therein. The conclusions of the Commission were held

by this Court to be amply supported by the evidence, and were accordingly sustained.

At page 226, this Court made the following pertinent observations:

> "Neither the railroads nor the Stock Yards exist for the benefit of the packers alone. Their [packers'] patronage is large and important, but neither in the regulation of the carriers nor in the regulation of the Stock Yards are they [packers] entitled to facilities or treatment that will ignore the existence of other interests."

The Court, at page 227, directed attention to certain important considerations, saying:

> "The interests of the public and of the community are entitled to consideration. This transportation is of a special kind of property on the hoof, which calls for special handling in the interests of economy, safety, sanitation, and health. The Commission has found that 'the evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago.' "

In the course of its opinion, at pages 230–1, this Court further stated:

> "It was the packers themselves who suppressed the competitive yards and alternative facilities for unloading their stock. The Commission, however, has not held the packers to be estopped by their conduct. It has only considered the practice and usage of the packers as bearing on the suitability of the Yard Company's unloading pens as a point of termination of the carriers' responsibility. The Commission has held it to be a reasonable practice that the railroads' responsibility for transportation of such direct shipment consigned by the packers to themselves at the Union Stock Yards ends with unloading into the unloading pens, which it found to be suitable, and that the carriers' failure to negotiate or purchase free egress for such shipments from the unloading pens has not resulted and does not result in an unreasonable practice."

After pointing out that the Union Stock Yards was named in the railroads' tariffs as a station to which the line-haul rates on livestock were applicable, that the Yard Company's unloading service was subject to regulation by the Interstate Commerce Commission, and that the stockyard services of the Yard Company were under the jurisdiction of the Secretary of Agriculture, the Court said at pages 232–3:

> "The Union Stock Yards are a public utility. The decision of the Commission that the transportation ends with unloading leaves the stock in the hands of a public utility—the Union Stock Yards—for delivery to the consignee. Neither the Interstate Commerce Commission nor this Court can assume that the charges or practices of that utility are unfair or unreasonable, that it is charging for services that are not performed or facilities not used, or that it is imposing on consignees unnecessary services."

In the present case, the Commission has not held that Swift is estopped by its adoption of the railroads' practice of making the Union Stock Yards their livestock terminal in the Stockyard District of Chicago, and has not denied Swift the right to have private sidetrack delivery of livestock. The Commission, however, could not ignore the fact that the practice of making centralized delivery—concurred in by Swift and other packers—had resulted in a physical plant and methods of operation which would make private sidetrack delivery both difficult and expensive. As the Commission said:

> "We have indicated generally the difficulties which would confront defendants if required to make delivery of livestock at complainant's plant, *the basic difficulty being that such method of delivery is not adapted to defendant's service, tracks and yards, as specially designed and developed, along with the city's intensive development, for performance of the centralized delivery service rendered at Chicago.* For some 70 years the method of conducting terminal operations in the stockyards district has been for the line-haul carriers, using Junction tracks, to carry all shipments of

livestock to the stockyards and make deliveries there, and for the Junction to perform the switching and spotting of other freight for the packers and many other industries in the area. As a result, *the Junction's main tracks, its yards and subyards and their tracks, are peculiarly designed and fitted for the operations and service described*, and any change, particularly as contemplating deliveries of livestock to the plants of the packers, would, as might be expected and as is shown, require a conflicting use of such yards and tracks and subject defendant's operations to interference and delays." (R. 72; emphasis supplied.)

The Commission outlined in detail the special services and handling which would be required to make private sidetrack delivery of livestock, and concluded that the assessment of the published switching charge of the Junction in addition to the line-haul rates would not be unreasonable or otherwise unlawful for private sidetrack delivery. (R. 72-81.) The findings of the Commission—all of which are fully supported by the record—plainly show that the line-haul rates prescribed for centralized delivery of livestock are not adequate for the expensive, specialized service involved in making plant delivery.

III.

The Rule of the Yard Company Prohibiting Cars of Dead Freight from Blocking Its Chutes Was Not in Issue and Is Not Unlawful.

Counsel for Swift argue (Brief 26-7, 44, 112) that the operating rule of the Yard Company which prevents cars of dead freight from being pulled into its chutes causes obstruction to the flow of traffic which the Commission should have noticed and remedied. It is asserted (Brief 112) that this rule, "which prevents even a single car of dead freight from resting on its [Yard Company's] tracks, is obviously designed to facilitate shipment of livestock to its own chutes and to burden such shipments destined elsewhere* * *."

This rule was not placed in issue by Swift's complaint before the Commission, and the Yard Company was not named as a defendant in that complaint. (R. 50–5.) The Commission properly confined its decision to the issues before it. *Oregon R. & N. Co.* v. *Fairchild*, 224 U.S. 510, 526.

The purpose of the rule is to prevent the blocking of the unloading chutes. (R. 664.) There is no evidence that the rule adversely affects the operations of any railroad except the Rock Island, which reaches the Union Stock Yards from the east, and has to operate through the Yards in order to get to the Ashland Avenue Yards. (R. 650.) The chute tracks of the Yard Company are adjacent to the running tracks of the Junction. (R. 650.) The Yard Company obviously could not permit the heavy flow of livestock to its public stockyard to be delayed by the blocking of its chutes with cars of dead freight any more than Swift could permit the loading and unloading of its freight upon its private sidetracks to be interfered with by even a temporary use of those tracks in connection with the handling of cars for other industries.

IV.

The Trackage Arrangements in Effect on the Chicago Junction Railway Are Not Unlawful.

Swift criticizes (Brief 26, 44, 112–13) the trackage arrangements on the Junction whereby the line-haul carriers are permitted to operate over its rails with their own power and crews for the purpose of handling livestock to and from the Union Stock Yards, but are not authorized to handle livestock to private sidetracks on the Junction. These arrangements date from 1865, and their validity cannot be doubted.

As a part of the original plan of establishing at one place a railroad livestock terminal and a central market for livestock, the railroads were given permission by the Yard Company,

which was then controlled by them, to use the terminal railroad now known as the Junction as a means of access to the union livestock terminal. This permission was continued by the various lessees of the terminal railroad, and is now extended by the River Road. One of the important purposes of the trackage privilege has been to enable the line-haul railroads to make delivery of livestock at the same place in order to avoid the necessity of switching livestock from one railroad terminal to another. (See Statement, *supra*, pp. 7–8, 11.) Livestock which comes in over one of the western roads is often reshipped to the east via one of the eastern roads; in fact, an average of about 300 carloads of livestock is so reshipped daily. (R. 795.)

There is no written agreement covering the use of the running tracks of the Junction by the line-haul carriers for the handling of livestock; but the practice is, and since 1865 has been, for the line-haul carriers to use those tracks as a means of ingress to and egress from the chutes at the Union Stock Yards. This service is one which the Junction itself would have to render if it were not performed by the line-haul carriers.

Private sidetrack delivery of livestock was never contemplated by any of the railroads. Their plan for a union terminal for livestock in what is now the Stockyard District of Chicago contemplated that all livestock would be delivered at one place, and that they would have running rights over the terminal railroad for the handling of livestock to and from the union livestock depot. (See Statement, *supra* pp. 7–8.) That privilege was given, and is still accorded, to them. The operations of the line-haul carriers over the Junction to and from the Union Stock Yards could not be discontinued without the approval of the Commission based upon a finding that public convenience and necessity permit the abandonment of such operations. *Smith* v. *Hoboken R. Co.*, 328 U.S. 123, 130; *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 144–7.

In *Chicago Junction Case*, 71 I. C. C. 631, the Commission, in authorizing the sublease of the Junction railroad to the River Road, stated at page 633:

> "The movement of live stock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each [line-haul] carrier moves its trains to the unloading chutes [at the Union Stock Yards] with its own power, and goes into the pens [at the Union Stock Yards] for outbound stock destined for its own line. All parties concede that *that is the only practical method of handling that traffic.*" (Emphasis supplied.)

The Commission in *Chicago Junction Case, supra*, also imposed, as condition No. 3, the following requirement:

> "The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the [New York] Central." (71 I. C. C. at 639.)

This condition requires, among other things, that the New York Central and its wholly-owned subsidiary, the River Road, shall continue to permit the line-haul carriers to handle livestock over the tracks of the Junction to the Union Stock Yards. The power of the Commission to attach this condition cannot be doubted. *United States* v. *Lowden*, 308 U.S. 225, 229–30, 238.

Trackage rights could not be granted to the line-haul carriers for the handling of livestock to private sidings without the approval of the Commission under Section 5(2) of the Interstate Commerce Act; and that section requires, as a condition to approval, that the Commission shall find that the proposed transaction "will be consistent with the public interest." (49 U.S.C.A. Sec. 5(2)(a) and (b).) The standard of "public interest," as this Court has said, "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of

transportation facilities." *Texas* v. *United States*, 292 U.S. 522, 531; *United States* v. *Lowden*, 308 U.S. 225, 230, 238. It would be physically impossible for the 22 line-haul carriers to transport shipments of livestock over the rails of the Junction to the private sidetracks of the packers.

The fact that the running rights of the line-haul carriers are not broad enough to enable them to carry livestock to the private sidetracks of Swift and other packers on the Junction is legally immaterial. Private sidetrack delivery is now offered by the Junction itself; and it must be presumed that it will perform the service to the limited extent that it may be requested so to do.

The proposal of the Junction to withdraw its holding out to perform private sidetrack delivery on livestock was not upheld by the Commission. In its report the Commission found:

> "The proposed complete exemption of livestock from transportation by the Junction under any circumstances is not justified." (R. 77.)
>
> * * * *
>
> "The published switching charge is appropriate for any switching that may occur of cars of livestock to complainant's proposed plant. It does not appear that the maintenance of a switching charge for livestock will have any detrimental effect upon terminal operations." (R. 80–1.)

The Commission presumably was of the opinion that the Junction should continue its switching charge on livestock in effect to enable the packers to obtain plant delivery by rail whenever some unusual situation, such as a strike of truck drivers or employes of the Yard Company, might make it necessary for the packers to use that kind of service.*

* A Swift witness, when asked why Swift sometimes took delivery of its direct shipments at the Union Stock Yards, stated there were times when trucks break down, truck drivers are not working, or the facilities at the plant of the Omaha Packing Company are overtaxed. (R. 410–11.)

This is not a case where trackage arrangements cause undue preference or prejudice. Swift may take delivery of its livestock at the established livestock terminal of the line-haul railroads at the same through rates paid by others who take delivery at that place; and it also may have plant delivery at the same through rates published for application to the private sidetracks of all other packers on the Junction. The higher rate basis for private sidetrack delivery is due to the much greater and more expensive terminal service required. (See Statement, *supra*, pp. 17–20.)

The through rates published from western origins to the Union Stock Yards were originally prescribed by the Commission in *Livestock-Western District Rates*, 176 I.C.C. 1, 190 I.C.C. 611. (R. 831.) As the first report in that case shows (176 I.C.C. at 122), the terminal operations at Chicago there considered were those of the line-haul carriers in making deliveries at the Union Stock Yards.* In *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.*, 219 I.C.C. 531, the terminal operations at Chicago under consideration were also those involved in making deliveries at the Union Stock Yards. (219 I.C.C. at 538–9.) As the Commission stated in its report in the present case, "we did not there [in the *Chicago Live Stock Exchange* case] consider what the services would be in connection with deliveries of livestock by the Junction on private industrial tracks." (R. 79.) The switching charge for private sidetrack delivery at packing plants on the Junction, then $12 per car, was found not unreasonable or otherwise unlawful in *Hygrade Food Products Corp.* v. *A. T. & S. F. Ry. Co.*, 195 I.C.C. 553, 558, a case in which the Omaha Packing Company, Swift's wholly-owned subsidiary, was an intervener. (R. 77.) Again in the present

* A witness who participated in *Livestock-Western District Rates* testified that no evidence was offered therein relating to private sidetrack deliveries at packing plants in the vicinity of the Union Stock Yards in Chicago. (R. 765–6.)

case, the Commission found that the rate basis for private sidetrack delivery was not unreasonable or otherwise unlawful. (R. 80–1.)

V.

The Commission Did Not Give Effect to the Covenant Between the Yard Company and the New York Central.

The effect of the decision of the Commission, Swift argues at length (Brief 117–34), is to give effect to a covenant by which the River Road, a wholly-owned subsidiary of the New York Central, is to operate the Junction railroad in a manner which will discriminate in favor of the business conducted at the Union Stock Yards. That business is the operation of a union railroad terminal and public market for livestock—a public utility business in both of its aspects. *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213, 217–22; *Swift & Co.* v. *United States*, 316 U.S. 216, 232. The argument of opposing counsel is advanced notwithstanding the statements of the Commission in its report that the operation of the Junction by the River Road under the control of the New York Central is subject to the requirements of the Interstate Commerce Act, and also to conditions imposed in *Chicago Junction Case*, 71 I.C.C. 631, 639–41, which "were and are broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards." (R. 80.)

The covenant to which Swift has reference is one in the lease of December 1, 1913, whereby the Yard Company leased the Chicago Junction Railway in perpetuity to Chicago Junction Railway Company, and the Junction Company agreed, among other things, "to conduct, manage, and operate the line of railroad by this instrument demised, and in so far as possible the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards." By an indenture of May 19, 1922, the Junction Company sub-

leased the terminal railroad to the River Road, and in that lease the River Road and the New York Central undertook to perform the above-quoted covenant of the Junction Company in the 1913 lease. (Ex. 57, R. 1039, 1961.)

The covenant is not an unqualified undertaking by the New York Central companies to operate the terminal railroad in such manner as will tend to benefit the Union Stock Yards, but is merely a covenant by which they undertook "in so far as possible" to so operate the demised railroad. This qualifying phrase requires the New York Central companies to do no more than is *physically* and *legally* possible. Contracts are not construed as requiring a violation of law if any other reasonable interpretation can be placed upon them. *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686, 691; *Chicago & Eastern Illinois R. Co.* v. *Doyle*, 256 Ill. 514, 519.

It should be borne in mind that the terminal railroad known as the Junction was originally constructed to connect the line-haul railroads with the Union Stock Yards, and that the Union Stock Yards was designed and constructed to provide a railroad terminal for the line-haul carriers and a public market for livestock. (See Statement, *supra*, pp. 6–8, 11.) This historical background explains the covenant, which does no more than require the New York Central companies to operate the demised railroad, to the extent they are legally and physically free so to do, in such manner as will tend to the benefit of the public market and livestock terminal at Chicago. The covenant does not require that the Junction railroad be operated or managed in any way contrary to federal or state law.

The covenant has operation only in those limited areas in which the New York Central companies are free to determine policy. The Union Stock Yards is a public livestock terminal and market which has an important and direct relation to the transportation of livestock. The unloading service performed

by the Yard Company is legally a part of the transportation service. *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213, 217–22. Although the services rendered after unloading are subject to the jurisdiction of the Secretary of Agriculture,* they are to a large extent services which the railroads would have to furnish if delivery were made at a terminal owned and operated by them. At such a terminal, the animals would have to be placed in pens and cared for until the consignees called for them, and egress would have to be provided to a public street. The cost of furnishing these terminal services would be reflected in the rates charged by the railroads. Even a packing company which took private sidetrack delivery would have to provide pens, because it obviously could not slaughter the animals as they came in, but would have to hold and care for them until it was ready to move them into the slaughterhouse.

The relationship of the business of the Union Stock Yards to the transportation of livestock and to the livestock industry of the country was pointed out by this Court in *Swift & Co.* v. *United States*, 316 U.S. 216, as follows:

> "The Stock Yards are not only a facility for the transportation of direct shipments from points of country origin to the packers; they also are an important factor in the entire animal industry of the United States." (316 U.S. at 226.)
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> "The Union Stock Yards are a public utility. The decision of the Commission that the transportation ends

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* "Neither the Interstate Commerce Commission nor this Court can assume that the charges or practices of that utility [the Yard Company] are unfair or unreasonable, that it is charging for services that are not performed or facilities not used, or that it is imposing on consignees unnecessary services. Nor can the Commission or this Court assume that, if unreasonable practices or charges are imposed by this utility, the Secretary of Agriculture would fail to correct them upon an appropriate complaint ***." *Swift & Co.* v. *United States*, 316 U.S. 216, 232–3.

with unloading leaves the stock in the hands of a public utility—the Union Stock Yards—for delivery to the consignee." (316 U.S. at 232.)

The argument concerning the covenant of the New York Central companies presents a false issue which Swift attempted to inject in the proceeding before the Commission. The Yard Company did not ask the Commission to enforce the covenant, and the River Road and the New York Central did not plead or urge it by way of defense. The Commission, moreover, did not in any way attempt to enforce or give effect to the covenant. Its decision is based solely on the transportation standards of the Interstate Commerce Act.

In its report, the Commission said:

> "The effect of the leases was to completely divest the Union Stock Yards of operation and control of the terminal railroad, the Court [in *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213, 216–17] saying that by ceasing to operate or control its railroad directly or indirectly, the Union Stock Yards restricted its transportation service to the loading or unloading of livestock as specified in its tariff. The operation of the Chicago Junction is subject not only to the provisions of the Interstate Commerce Act but also to the conditions imposed by the Commission in the *Chicago Junction Case, supra*. Those conditions *** were and are broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards." (R. 80.)

There is nothing in the report of the Commission which warrants any charge that its conclusions were influenced in the slightest degree by the covenant of the River Road and the New York Central; on the contrary, the passage just quoted from its report plainly shows that the Commission would not permit operation of the Junction by the New York Central companies "to the special advantage and interest of the Union Stock Yards." At the hearing before the Commission,

counsel for Swift solicited and obtained from counsel for the New York Central companies a stipulation "that the Chicago Junction is being operated or leased, whatever you want to call it, under and in accordance with the terms and conditions set by the Commission in the *Chicago Junction Case*, 71 I.C.C. 631." (R. 388.) In view of this stipulation, it must be assumed that the conditions imposed by the Commission have been and are being strictly observed, and Swift is not in position to make any charge to the contrary.

The decision in *United States* v. *Baltimore & Ohio R. Co.*, 333 U.S. 169, cited by counsel for Swift (Brief 118), is not pertinent. The track involved in that case was owned by the Cleveland Union Stock Yards Company, and was used by the New York Central under a trackage agreement which did not permit the railroad to use the track for the carriage of livestock to private sidetracks of the packers. None of the tracks of the Junction is closed to the handling of livestock; and Swift can have private sidetrack delivery of livestock at any time it wishes upon payment of a switching charge found reasonable by the Commission.

Attention is directed by Swift (Brief 121–2) to a letter written by counsel for the Yard Company to the General Counsel of the River Road and New York Central under date of September 4, 1947, in which counsel for the Yard Company stated that those carriers were obligated by the above-mentioned covenant to defend Swift's complaint and to take appropriate steps to raise the issues necessary for a determination of all the questions involved. It is then suggested (Brief 123) that the New York Central companies defended the Swift complaint only because counsel for the Yard Company wrote that letter.

The letter was put in evidence by counsel for Swift shortly before the close of the hearing before the Commission. (R. 1038–9; Ex. 57, R. 1039, 1961–2.) As the letter indicates, it was written because one of the officers of the New York Cen-

tral companies had advised counsel for the Yard Company during the week previous to the date of the letter (September 4, 1947) that they were not planning to take any part in the defense of Swift's complaint, even though most of the evidence necessary for defense and the power to raise the necessary issues for the determination of all questions involved were in the possession of the River Road. (R. 1961–2.)

Swift's complaint before the Commission was filed on July 29, 1947. (R. 1, 58.)* In August, the chief operating officers of the River Road were advised by its Vice President of the allegations of the Swift complaint and asked whether the Junction could handle livestock through the Ashland Avenue Yards. The operating officers replied that livestock could not be so handled without disrupting the operations of those yards. (R. 1039.) It was only shortly thereafter (the week previous to September 4) that one of the traffic officers of the New York Central Lines advised counsel for the Yard Company that Swift's complaint would not be defended. (R. 1961.)

What could have happened in this short period of time to cause the two carriers to decide not to defend a complaint which would result in the complete disruption of the operations of the Ashland Avenue Yards? A deposition taken by counsel for the Live Stock Exchanges, which gives the answer to this question, was held inadmissible by the District Court. (R. 140–5, 149.)

Counsel for the Yard Company presumably were fully aware of the natural reluctance of the management of any railroad to take the lead in the defense of a rate complaint filed by a large shipper against a number of railroads; and the letter undoubtedly was written because it was important to the Yard Company that the issues and evidence necessary to a

* The date shown at page 58 of the printed record is July 9, but this is a misprint. The correct date, July 29, is shown in paragraph 4 of Swift's court complaint. (R. 1.)

full understanding of the entire problem be presented to the Commission. The letter did no more than call upon the two New York Central companies—the only defendants in position to do so effectively—to lay before the tribunal established by Congress to hear rate complaints against railroads the evidence and the issues necessary to enable it to reach an informed judgment.* The fact, apparent throughout its brief, that Swift is chagrined because the chaotic operating conditions that would result from the granting of its demand were disclosed to the Commission does not give Swift any ground for complaint.

The suggestion is made by counsel for Swift (Brief 122–3) that the letter contained an implied threat that, if the Swift complaint were not defended, the lease of the Chicago Junction Railway to the River Road would be terminated and the property leased to a competitor of the New York Central. This suggestion has no warrant in the text of the letter. (R. 1961–2.) In making the suggestion, moreover, counsel for Swift would seem to have overlooked the pertinent provisions of the Interstate Commerce Act. The lease of 1922 could not be effectively terminated, even for breach, without a certificate from the Commission under Section 1(18) of the Interstate Commerce Act (49 U.S.C.A. Sec. 1(18)) that public convenience and necessity permitted the abandonment of operation by the River Road. *Smith* v. *Hoboken R. Co.*, 328 U.S. 123, 130; *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 144–7. A new lease to another carrier would also require the approval of the Commission under Section 5(2) of the Interstate Commerce Act (49 U.S.C.A. Sec. 5(2)). *Thompson* v. *Texas Mexican R. Co.*, *supra*, 146-7.

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* "The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, *but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier.*" *Phillips* v. *Grand Trunk Western Ry. Co.*, 236 U.S. 662, 667; emphasis supplied.

CONCLUSION.

The decision of the Interstate Commerce Commission that the rate basis complained of is not unreasonable or otherwise unlawful has "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U.S. 441, 454. Counsel for Swift have not advanced any sound reason for disturbing the order of the Commission, and the judgment of the District Court upholding that order should be affirmed.

Respectfully submitted

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